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## CORPORATIONS-DIVIDENDS ON NON-CUMULATIVE PREFERRED STOCK

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CORPORATIONS—DIVIDENDS ON NON-CUMULATIVE PREFERRED STOCK.—Plaintiff held non-cumulative preferred stock in the defendant corporation. From 1925 through 1928 no dividends were declared upon this stock; although earnings were sufficient they were used instead for property improvements. Since 1928, dividends have been paid regularly on this stock at the specified rate. In 1930 a dividend was declared on the common stock. Plaintiff sued to have this amount paid instead as a dividend on the preferred stock, and to enjoin any payment of dividends on the common stock until full dividends were paid on the non-cumulative preferred stock for the period from 1925 to 1928. *Held*, that the non-cumulative stockholders were not entitled to demand back dividends, this being the effect of their contract when interpreted in the light of corporate practice. *Joslin v. Boston & M. R. R.* (Mass. 1931) 175 N.E. 156.

Non-cumulative preferred stock has received a full measure of publicity since publication of the doctrine that if earnings were sufficient in any year, even though a dividend were not then paid, such stock could not be deprived of its dividend for that year, and no junior stock could receive a dividend until the passed dividend had been paid. Berle, "Non-cumulative Preferred Stock," 23 *COL. L. REV.* 358; see also 34 *YALE L. J.* 657. This doctrine, making the stock semi-cumulative, found favor in *Barclay v. Wabash Ry.*, 30 F.(2d) 260, but was repudiated in the Supreme Court on the grounds that the charter,

interpreted in the light of common understanding of the term "non-cumulative," gave no right to such dividends, and that this contract was not bad for reasons of policy. *Wabash Ry. v. Barclay*, 280 U. S. 197, 74 L. ed. 368; see also 28 MICH. L. REV. 763. The principal case, professing a desire for uniformity with the federal courts in this field, adopted this decision. On the other hand, by an interpretation of the state corporation code, New Jersey has gone the full way in making this stock cumulative for years in which there were earnings sufficient for dividends. *Day v. United States & Co.*, 95 N. J. Eq. 389, 123 Atl. 546, aff'd. by an equally divided court, 96 N. J. Eq. 736, 126 Atl. 302. See also 23 MICH. L. REV. 779. The principal case, adopting a stricter view of non-cumulative, does not depart in theory from *Morse v. Boston & M. R. R.*, 263 Mass. 308, 160 N.E. 894, which, in holding that non-cumulative preferred stockholders could not force the directors to declare dividends in the absence of an abuse of discretion, relied upon a general rule that a declaration of dividends rests in the discretion of the directors, which rule it found to be unvaried by the stockholder's contract. The *Morse* case expressed approval of the doctrine that the directors, if they choose, may declare such dividends for past years when the earnings were sufficient but were devoted to other purposes. *Collins v. Portland Elec. Pwr. Co.*, 12 F.(2d) 671; *Bassett v. United States & Co.*, 74 N. J. Eq. 668, 70 Atl. 929; *Moran v. United States, etc. Co.*, 95 N. J. Eq. 389, 123 Atl. 546, aff'd, 96 N. J. Eq. 698, 126 Atl. 329. Since the common stock usually controls the board and an abuse of discretion is difficult to prove, this right to back dividends, if the directors choose to declare them, will in most cases be purely illusory. It might be noted in the principal case that the prior earnings had gone into property improvements considered necessary to the performance of the corporation's duty to the public, and had never been withdrawn as in the *Bassett* case, and also that dividends were to be paid "as determined from time to time by the Board of Directors" which might be interpreted as repudiating the plaintiff's contentions. The court did not labor these points, but rested its decision on the broad ground of a generally accepted definition of non-cumulative which determined the true meaning of the contract. The status of non-cumulative preferred stock and its dividends has been more the subject of discussion and prophecy than of decision. Further comments may be found in 38 YALE L. J. 820; *ibid.* 1003; 42 HARV. L. REV. 805; 27 COL. L. REV. 53; 14 CORN. L. Q. 341; 74 U. OF PA. L. REV. 605; 77 *ibid.* 897; 11 VA. L. REV. 553.